

1 RICHARD DOYLE, City Attorney (#88625)
2 GEORGE RIOS, Assistant City Attorney (#77908)
3 ROBERT FABELA, Sr. Deputy City Attorney (#148098)
4 Office of the City Attorney
5 200 East Santa Clara Street
6 San José, California 95113-1905
7 Telephone Number: (408) 535-1900
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10 Attorneys for RICHARD DOYLE, in his official capacity
11 as City Attorney for the City of San Jose

12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15 VIDEO SOFTWARE DEALERS
16 ASSOCIATION and ENTERTAINMENT
17 SOFTWARE ASSOCIATION,

18 Plaintiffs,

19 v.

20 ARNOLD SCHWARZENEGGER, in his
21 official capacity as Governor of the State
22 of California; BILL LOCKYER, in his
23 official capacity as Attorney General of the
24 State of California; GEORGE KENNEDY,
25 in his official capacity as Santa Clara
26 County District Attorney, RICHARD
27 DOYLE, in his official capacity as City
28 Attorney for the City of San Jose; and
ANN MILLER RAVEL, in her official
capacity as County Counsel for the
County of Santa Clara,

Defendants.

Case Number: C05-04188 RMW

**DECLARATION OF ROBERT FABELA
IN OPPOSITION TO PLAINTIFF'S
MOTION FOR ATTORNEYS' FEES
AND COSTS**

Date: October 19, 2007
Time: 9:00 a.m.
Courtroom: 6
Judge: Hon. Ronald M. Whyte

I, Robert Fabela, declare as follows:

I am an attorney licensed to practice law in the state of California and the United States District Court, Northern District of California. I am a Senior Deputy City Attorney with the City of San Jose, and represent San Jose City Attorney Richard Doyle in this matter. I have

1 personal knowledge of the matters set forth herein and, if called as a witness, could and would
2 competently testify thereto.

3 1. The following is the full extent of the City Attorney's involvement and participation
4 in the above-captioned matter:

- 5 a. The City Attorney was named as a defendant, in his official capacity,
6 pursuant to the provisions of Civil Code Section 1746.4, which provided
7 that violations of the Act in question "may be prosecuted by any City
8 Attorney" in California. (See Complaint at ¶19);
- 9 b. The City Attorney was served with the lawsuit on or about October 18,
10 2005;
- 11 c. In order to avoid having a default judgment issued against him, the City
12 Attorney filed an Answer on November 21, 2005 (See Answer, attached
13 hereto as Exhibit A);
- 14 d. The City Attorney filed a one sentence Notice of Joinder in Oppositions to
15 Motion for Preliminary Injunctions on December 2, 2005 (See Joinder,
16 attached hereto as Exhibit B);
- 17 e. I personally appeared on behalf of the City Attorney at the December 9,
18 2005 Preliminary Injunction hearing, but made no oral argument
19 whatsoever;
- 20 f. Since December 9, 2005, the City Attorney has made no appearance in
21 this case at all, either through pleadings or at any subsequent hearings,
22 until filing this opposition to attorneys' fees and costs.

23 I declare under penalty of perjury under the laws of the state of California and the
24 United States of America that I have personal knowledge of the foregoing and that it is true
25 and correct, and that this Declaration was executed on the 25th day of September, 2007, at
26 San Jose, California.

27 /s/ Robert Fabela

28 ROBERT FABELA

EXHIBIT A

1 RICHARD DOYLE, City Attorney (#88625)
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17 ARNOLD SCHWARZENEGGER, in his
official capacity as Governor of the State
18 of California; BILL LOCKYER, in his
official capacity as Attorney General of the
19 State of California; GEORGE KENNEDY,
in his official capacity as Santa Clara
20 County District Attorney, RICHARD
DOYLE, in his official capacity as City
21 Attorney for the City of San Jose; and
ANN MILLER RAVEL, in her official
22 capacity as County Counsel for the
County of Santa Clara,
23

24 Defendants.

Case Number: C05-04188 RMW

**ANSWER BY CITY ATTORNEY
RICHARD DOYLE TO COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

25
26 Defendant Richard Doyle ("Defendant"), in his official capacity as City Attorney for the
27 City of San Jose, hereby answers the Complaint ("Complaint") of Plaintiffs on file herein and
28 admits, denies, and alleges as follows:

1 1. Answering the allegations of paragraph 1 of the Complaint, Defendant has
2 insufficient information or belief to enable him to respond and, basing his denial on that
3 ground, denies each and every allegation contained therein.

4 2. Answering the allegations of paragraph 2 of the Complaint, Defendant admits
5 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
6 Defendant denies the remaining allegations contained therein

7 3. Answering the allegations of paragraph 3 of the Complaint, Defendant denies
8 the allegations contained therein.

9 4. Answering the allegations of paragraph 4 of the Complaint, Defendant
10 acknowledges the legal arguments made therein, but has insufficient information or belief to
11 enable him to respond and, basing his denial on that ground, denies each and every
12 allegation contained therein.

13 5. Answering the allegations of paragraph 5 of the Complaint, Defendant admits
14 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
15 Defendant denies the remaining allegations contained therein.

16 6. Answering the allegations of paragraph 6 of the Complaint, Defendant has
17 insufficient information or belief to enable him to respond and, basing his denial on that
18 ground, denies each and every allegation contained therein.

19 7. Answering the allegations of paragraph 7 of the Complaint, Defendant denies
20 the allegations contained therein.

21 8. Answering the allegations of paragraph 8 of the Complaint, Defendant admits
22 that the complaint states that the action is brought against these defendants in their official
23 capacities. Except as so admitted, Defendant denies the remaining allegations contained
24 therein

25 9. Answering the allegations of paragraph 9 of the Complaint, Defendant admits
26 that he is employed in this judicial district, Defendant has insufficient information or belief to
27 enable him to respond and, basing his denial on that ground, denies each and every
28 remaining allegation contained therein.

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2 10. Answering the allegations of paragraph 10 of the Complaint, Defendant denies
3 the allegations contained therein.

4 11. Answering the allegations of paragraph 11 of the Complaint, Defendant has
5 insufficient information or belief to enable him to respond and, basing his denial on that
6 ground, denies each and every allegation contained therein.

7 12. Answering the allegations of paragraph 12 of the Complaint, Defendant has
8 insufficient information or belief to enable him to respond and, basing his denial on that
9 ground, denies each and every allegation contained therein.

10 13. Answering the allegations of paragraph 13 of the Complaint, Defendant has
11 insufficient information or belief to enable him to respond and, basing his denial on that
12 ground, denies each and every allegation contained therein.

13 14. Answering the allegations of paragraph 14 of the Complaint, Defendant denies
14 the allegations contained therein.

15 15. Answering the allegations of paragraph 15 of the Complaint, Defendant denies
16 the allegations contained therein.

17 16. Answering the allegations of paragraph 16 of the Complaint, Defendant admits
18 the allegations contained therein based on information and belief.

19 17. Answering the allegations of paragraph 17 of the Complaint, Defendant has
20 insufficient information or belief to enable him to respond and, basing his denial on that
21 ground, denies each and every allegation contained therein.

22 18. Answering the allegations of paragraph 18 of the Complaint Defendant has
23 insufficient information or belief to enable him to respond and, basing his denial on that
24 ground, denies each and every allegation contained therein.

25 19. Answering the allegations of paragraph 19 of the Complaint, Defendant admits
26 that Richard Doyle is the City Attorney for the City of San Jose and that the Act exists, the
27 terms of which speak for themselves. Except as so admitted, Defendant denies the
28 remaining allegations contained therein.

1 20. Answering the allegations of paragraph 20 of the Complaint, Defendant has
2 insufficient information or belief to enable him to respond and, basing his denial on that
3 ground, denies each and every allegation contained therein.

4 21. Answering the allegations of paragraph 21 of the Complaint, Defendant denies
5 the allegations contained therein.

6 22. Answering the allegations of paragraph 22 of the Complaint, Defendant denies
7 the allegations contained therein.

8 23. Answering the allegations of paragraph 23 of the Complaint, Defendant has
9 insufficient information or belief to enable him to respond and, basing his denial on that
10 ground, denies each and every allegation contained therein.

11 24. Answering the allegations of paragraph 24 of the Complaint, Defendant admits
12 the allegations contained therein based on information and belief.

13 25. Answering the allegations of paragraph 25 of the Complaint, Defendant
14 acknowledges the legal arguments made therein, but has insufficient information or belief to
15 enable him to respond and, basing his denial on that ground, denies each and every
16 allegation contained therein.

17 26. Answering the allegations of paragraph 26 of the Complaint, Defendant
18 acknowledges the legal arguments made therein, but has insufficient information or belief to
19 enable him to respond and, basing his denial on that ground, denies each and every
20 allegation contained therein.

21 27. Answering the allegations of paragraph 27 of the Complaint, Defendant admits
22 the allegations contained therein based on information and belief.

23 28. Answering the allegations of paragraph 28 of the Complaint, Defendant denies
24 the allegations contained therein.

25 29. Answering the allegations of paragraph 29 of the Complaint, Defendant denies
26 the allegations contained therein.

27

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1 30. Answering the allegations of paragraph 30 of the Complaint, Defendant admits
2 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
3 Defendant denies the remaining allegations contained therein

4 31. Answering the allegations of paragraph 31 of the Complaint, Defendant admits
5 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
6 Defendant denies the remaining allegations contained therein

7 32. Answering the allegations of paragraph 32 of the Complaint, Defendant admits
8 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
9 Defendant denies the remaining allegations contained therein

10 33. Answering the allegations of paragraph 33 of the Complaint, Defendant admits
11 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
12 Defendant denies the remaining allegations contained therein

13 34. Answering the allegations of paragraph 34 of the Complaint, Defendant admits
14 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
15 Defendant denies the remaining allegations contained therein

16 35. Answering the allegations of paragraph 35 of the Complaint, Defendant admits
17 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
18 Defendant denies the remaining allegations contained therein

19 36. Answering the allegations of paragraph 36 of the Complaint, Defendant admits
20 the existence of the "Act," the terms of which speaks for themselves. Except as so admitted,
21 Defendant denies the remaining allegations contained therein

22 37. Answering the allegations of paragraph 37 of the Complaint, Defendant denies
23 the allegations contained therein.

24 38. Answering the allegations of paragraph 38 of the Complaint, Defendant denies
25 the allegations contained therein.

26 39. Answering the allegations of paragraph 39 of the Complaint, Defendant denies
27 the allegations contained therein.
28

1 40. Answering the allegations of paragraph 40 of the Complaint, Defendant denies
2 the allegations contained therein.

3 41. Answering the allegations of paragraph 41 of the Complaint, Defendant denies
4 the allegations contained therein.

5 42. Answering the allegations of paragraph 42 of the Complaint, Defendant denies
6 the allegations contained therein.

7 43. Answering the allegations of paragraph 43 of the Complaint, Defendant denies
8 the allegations contained therein.

9 44. Answering the allegations of paragraph 44 of the Complaint, Defendant denies
10 the allegations contained therein.

11 45. Answering the allegations of paragraph 45 of the Complaint, Defendant denies
12 the allegations contained therein.

13 46. Answering the allegations of paragraph 46 of the Complaint, Defendant denies
14 the allegations contained therein.

15 47. Answering the allegations of paragraph 47 of the Complaint, Defendant has
16 insufficient information or belief to enable him to respond and, basing his denial on that
17 ground, denies each and every allegation contained therein.

18 48. Answering the allegations of paragraph 48 of the Complaint, Defendant denies
19 the allegations contained therein.

20 49. Answering the allegations of paragraph 49 of the Complaint, Defendant denies
21 the allegations contained therein.

22 50. Answering the allegations of paragraph 50 of the Complaint, Defendant
23 acknowledges the legal arguments made therein, but has insufficient information or belief to
24 enable him to respond and, basing his denial on that ground, denies each and every
25 allegation contained therein.

26 51. Answering the allegations of paragraph 51 of the Complaint, Defendant denies
27 the allegations contained therein.

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1 52. Answering the allegations of paragraph 52 of the Complaint, Defendant denies
2 the allegations contained therein.

3 53. Answering the allegations of paragraph 53 of the Complaint, Defendant
4 incorporates by reference its answers to paragraphs 1 through 52 of the Complaint.

5 54. Answering the allegations of paragraph 54 of the Complaint, Defendant denies
6 the allegations contained therein.

7 55. Answering the allegations of paragraph 55 of the Complaint, Defendant denies
8 the allegations contained therein.

9 56. Answering the allegations of paragraph 56 of the Complaint, Defendant denies
10 the allegations contained therein.

11 57. Answering the allegations of paragraph 57 of the Complaint, Defendant denies
12 the allegations contained therein.

13 58. Answering the allegations of paragraph 58 of the Complaint, Defendant denies
14 the allegations contained therein.

15 59. Answering the allegations of paragraph 59 of the Complaint, Answering the
16 allegations of paragraph 58 of the Complaint, Defendant incorporates by reference its
17 answers to paragraphs 1 through 58 of the Complaint.

18 60. Answering the allegations of paragraph 60 of the Complaint, Defendant denies
19 the allegations contained therein.

20 61. Answering the allegations of paragraph 61 of the Complaint, Defendant denies
21 the allegations contained therein.

22 62. Answering the allegations of paragraph 62 of the Complaint, Defendant denies
23 the allegations contained therein.

24 63. Answering the allegations of paragraph 63 of the Complaint, Defendant
25 incorporates by reference its answers to paragraphs 1 through 62 of the Complaint.

26 64. Answering the allegations of paragraph 64 of the Complaint, Defendant
27 acknowledges the legal arguments made therein, but has insufficient information or belief to
28

1 enable him to respond and, basing his denial on that ground, denies each and every
2 allegation contained therein.

3 65. Answering the allegations of paragraph 65 of the Complaint, Defendant denies
4 the allegations contained therein.

5 66. Answering the allegations of paragraph 66 of the Complaint, Defendant denies
6 the allegations contained therein.

7 **AFFIRMATIVE DEFENSES**

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9 **FIRST AFFIRMATIVE DEFENSE**

10 The Complaint and each alleged cause of action fail to state facts sufficient to
11 constitute a cause of action.

12 **SECOND AFFIRMATIVE DEFENSE**

13 The injunction requested, if enforced, would compel an act contrary to public policy
14 and harmful to the public interest.

15 **THIRD AFFIRMATIVE DEFENSE**

16 All of the immunities and defenses afforded by Government Code §§800-1000,
17 inclusive.

18 **FOURTH AFFIRMATIVE DEFENSE**

19 The challenged acts are discretionary acts, and Defendant properly exercised his
20 discretion.

21 **FIFTH AFFIRMATIVE DEFENSE**

22 Plaintiff has failed to name real parties in interest and/or indispensable parties.

23 **SIXTH AFFIRMATIVE DEFENSE**

24 Plaintiff has failed to allege a justiciable controversy.

25 **SEVENTH AFFIRMATIVE DEFENSE**

26 Plaintiff has failed to mitigate damages.

27 **EIGHTH AFFIRMATIVE DEFENSE**

28 Plaintiff is barred from recovering from Defendant on the grounds of estoppel.

1 **NINTH AFFIRMATIVE DEFENSE**

2 Plaintiff lacks standing to bring the causes of action alleged.

3 **TENTH AFFIRMATIVE DEFENSE**

4 Plaintiff is barred from obtaining injunctive or other equitable relief by the reason of
5 unclean hands.

6 **ELEVENTH AFFIRMATIVE DEFENSE**

7 Plaintiff's Complaint if premature and/or barred in that there is no case or controversy
8 at this time.

9 **TWELFTH AFFIRMATIVE DEFENSE**

10 Plaintiff has named incorrect and improper parties as defendants in this matter.

11 **THIRTEENTH AFFIRMATIVE DEFENSE**

12 Defendant's conduct was privileged and/or justified under applicable law.

13 **FOURTEENTH AFFIRMATIVE DEFENSE**

14 Plaintiff's injuries and damages, if any, were proximately caused or contributed to in
15 whole or in part by the negligence of third parties or entities not under the direction, control or
16 authority of Defendant and for which Defendant are not responsible.

17 **FIFTEENTH AFFIRMATIVE DEFENSE**

18 All other affirmative defenses alleged by the other defendants in this action.

19

20 WHEREFORE, Defendant prays for judgment as follows:

- 21 1. That judgment be rendered in favor of Defendant and against Plaintiff;
22 2. That Plaintiff take nothing by reason of its Complaint on file herein;
23 3. That Plaintiff's request for injunctive and declaratory relief be denied;
24 4. That Defendant be awarded its costs, attorneys' fees, and disbursements of
25 suit incurred herein; and

26

27

28 ///

1 5. For such other and further relief as the Court may deem just and proper.

2
3 Dated: November 21, 2005

RICHARD DOYLE, City Attorney

4
5 By: /s/ Robert Fabela
6 ROBERT FABELA
 Sr. Deputy City Attorney

7 Attorneys for RICHARD DOYLE, in his
8 official capacity as City Attorney for the City
9 of San Jose

EXHIBIT B

1 RICHARD DOYLE, City Attorney (#88625)
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County District Attorney, RICHARD
DOYLE, in his official capacity as City
21 Attorney for the City of San Jose; and
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22 capacity as County Counsel for the
County of Santa Clara,
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24 Defendants.
25

Case Number: C05-04188 RMW

**NOTICE OF JOINDER OF SAN JOSE
CITY ATTORNEY RICK DOYLE IN
OPPOSITIONS TO MOTION FOR
PRELIMINARY INJUNCTIONS**

26 PLEASE TAKE NOTICE that Defendant Richard Doyle hereby joins in the Oppositions
27 of Defendants George Kennedy, Ann Ravel, Arnold Schwarzenegger, and Bill Lockyer to
28 Plaintiffs' Motion for Preliminary Injunction, which oppositions papers were filed on November

1 10, 2005. The arguments and supporting papers included in such Oppositions are hereby
2 incorporated by reference as though fully set forth herein.

3
4 Dated: December 2, 2005

R ICHARD DOYLE, City Attorney

5
6 By: /s/ Robert Fabela
7 ROBERT FABELA
8 Sr. Deputy City Attorney

9 Attorneys for RICHARD DOYLE, in his
10 official capacity as City Attorney for the City
11 of San Jose
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